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Supreme Court of the United States

OCTOBER TERM, 1997

NEWSWEEK, INC.,

Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, LAWRENCE H. FUCHS, AND ROBERT F. MILLIGAN,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

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BRIEF OF *AMICUS CURIAE* TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONER

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Brief by Alabama, Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Guam, Hawaii, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming as Amici Curiae in Support of Respondent, *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768 (1992) (No. 91-615) 17

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BRIEF OF *AMICUS CURIAE* TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of the Supreme Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari.[1] Tax Executives Institute (hereinafter "TEI" or "the Institute") is a voluntary, nonprofit association of

[1] Pursuant to Rule 37.6, *amicus* TEI states that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Tax Executives Institute has received the written consents of the Petitioner and Respondents to the filing of this brief; those consents have been filed with the Clerk of the Court.

corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 5,000 members who represent nearly 2,800 of the leading businesses in the United States and Canada, nearly all of which are engaged in interstate commerce.

The members of the Institute represent a cross-section of the business community in North America. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the Nation, to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and to vindicating the Due Process and other constitutional rights of business taxpayers. As tax professionals who recognize the States' right to collect properly levied taxes and who respect the legitimacy of State assessments, our members have a significant interest in the standards applied in assessing the adequacy of remedies accorded taxpayers for unconstitutionally imposed and collected state taxes.

This case raises fundamental questions about the remedies available for taxpayers who have paid state taxes that are subsequently found to contravene the Constitution. In *Reich v. Collins*, 513 U.S. 106 (1994), the Court held that a State may not hold out what plainly appears to be a "clear and certain" post-deprivation remedy—its tax refund statute—and then declare, after taxpayers have paid the disputed tax, that no such remedy exists.

This case focuses—once again—on the obstacles a State may constitutionally erect to deny taxpayers a refund of illegally collected taxes. Specifically, the issue is whether the State of Florida has improperly "reconfigure[d] its scheme, unfairly, in midcourse"—to "switch" disingenuously to a cry of inapplicability after

having "bait[ed]" taxpayers into believing that a refund remedy exists. *Reich*, 513 U.S. at 111.

The Instiute's members and the businesses by which they are employed have a keen and vital interest in ensuring the efficacy and effectiveness of remedies provided to taxpayers who are subjected to unconstitutional state taxation. Given the checkered history of Florida and other States on this issue, this case promises to affect far more than the State of Florida's authority to retain the unconstitutional taxes improperly exacted from the Petitioner. *Amicus* TEI is concerned about the deleterious effect the Florida court's decision could have on the equitable administration of other States' taxing schemes relating to business taxpayers.

Because TEI members and the businesses by whom they are employed will be materially affected by the application and the aftermath of the Florida court's decision, the Institute has a special interest in the outcome of this case.

SUMMARY OF ARGUMENT

The core issue in this case is whether taxpayers who have been subjected to an unconstitutional tax are entitled to refunds of the illegally extracted monies. Historically, taxpayers who have mounted successful challenges to state tax statutes have had the improperly collected tax refunded to them. Beginning in the 1980s, however, taxpayers who in good faith had paid their taxes (often in reliance on the protection of refund statutes) have found themselves consigned to the role of Sisyphus. No matter how far up the mountain they rolled the "stone" of their refund claims, the State haughtily claimed that it was not far enough and pushed the stone down the mountainside.

The last decade and a half has seen a disturbing number of state taxing statues—including more than one of Florida's laws—invalidated on constitutional grounds.

Even after the statutes were voided, some States resisted efforts to refund the taxes that they had collected under the invalidated laws—first on grounds the substantive decision should be given prospective-only effect and then on grounds the taxpayer failed to abide by the affected State's procedural requirements. In *Reich v. Collins*, 513 U.S. 106 (1994), the Court sought to stem this tide. It squarely addressed the issue of remedy, declaring that a State may not hold out what plainly appears to be a "clear and certain" post-deprivation remedy—its tax refund statute—and subsequently declare, after taxpayers have paid the disputed tax, that the remedy is inapplicable to the case at hand. The instant case reprises this question of remedy—a question the Court undoubtedly thought it had resolved by declaring in *Reich* that the States may not resort to "bait and switch" tactics. *Reich*, 513 U.S. at 111.

In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990), this Court stated that, to satisfy the requirements of due process, the State must provide an aggrieved taxpayer either with a pre-deprivation hearing (without placing the taxpayer seeking such a hearing under duress) or with "meaningful backward-looking relief." That relief, the Court said, must be "clear and certain." *Id.* at 39. On its face, the State of Florida's statutory refund scheme comports with this procedural requirement. This case is before the Court, however, because the court below vitiated the existing remedy, finding first that the refund statute was inapposite and further that Florida law provided a constitutionally sufficient pre-deprivation remedy. In doing so, the court ignored the clear language of Florida's refund statute, as well as more than 50 years of precedents holding the law applicable to unconstitutionally collected taxes.

In *Reich*, the Court voiced its repugnance at the State's "bait and switch" tactics and ordered meaningful backward-looking relief. 513 U.S. at 111. Nevertheless, the Florida court here refused to order a refund to the taxpayer and its refusal is precisely the type of "mischievous consequences" that the Court warned of 130 years ago in confirming the application of the Supremacy Clause to this Court's decisions. *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867). Stated bluntly, like the State of Georgia in *Reich*, Florida here endeavors to shoehorn Newsweek into a refund scheme that, by its very terms, will deny it relief. It is clearly one with the reconfiguration that the Court found objectionable in *Reich*. 513 U.S. at 113.

This Court is properly loath to impinge on the state courts' prerogative to fashion remedies after the substantive issues in the case are decided. In the past decade and a half, State after State has distended this Court's holdings —on the merits, on the retroactivity question, and now on the issue of remedies—in order to eviscerate the protections accorded taxpayers by the Constitution. The Court "cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Chapman v. California*, 386 U.S. 18, 21 (1967). Unless the Court reviews this case and mandates meaningful relief, the States will continue to have an incentive to enact unconstitutional statutes, knowing that, at worst, they may have to mend their ways in the future.

It is time for this Court to say that enough is enough. It is time to reject the States' beguiling interpretations of state law, distended readings of the Constitution, and facile efforts to vitiate the Court's mandates. It is time to say, once again, that "[t]he time for toleration has come to an end." *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987).

The Court should grant a writ of certiorari, reverse the decision of the District Court of Appeal of Florida, and order the State to refund the taxes it unconstitutionally imposed on the Petitioner.

ARGUMENT

I.

The core issue in this case is whether taxpayers who have been subjected to an unconstitutional tax are entitled to refunds of the illegally extracted monies. Historically, taxpayers who have mounted successful challenges to state tax statutes have enjoyed the fruits of their labors: Upon securing judicial affirmation of a tax's invalidity, they had the improperly collected tax refunded to them. This historical practice not only squared with the American sense of fairness (essentially restoring the aggrieved taxpayers to the position they would have occupied had the improper tax not been levied in the first instance), but it encouraged taxpayers to pay suspect taxes and then challenge them (rather than recalcitrantly refusing to pay). Hence, the practice was not only just in a philosophical sense, but it provided the State with a stable funding source during the pendency of the litigation. This practice was built on trust—on the notion that, if what the State did is found to be improper, it will not be the compliant taxpayers who suffered.

Beginning in the 1980s, many States sought financial gain in routinely breaching this bedrock trust. The "end" of collecting (and keeping) revenues seemed to justify the "means" of first imposing a discriminatory tax and then, upon its invalidation, depriving aggrieved taxpayers of the only true remedy—refunds—by engaging in the governmental equivalent of three-card monte. Trust was supplanted by cynicism. Taxpayers who in good faith had paid their taxes (in reliance on explicit refund statutes and the aforementioned historical practice) found themselves consigned to the role of Sisyphus. No matter how far up the mountain they rolled the "stone" of their refund claims, the State haughtily claimed that it was not far enough and pushed them down the mountainside.

Is it any wonder that with growing frequency taxpayers are heeding the call of "don't pay, don't pay, don't pay"—

because they fear that if they abide by the rules by paying the tax and then suing for refunds, they may be denied a true remedy?[2] Is it any wonder that when the State violates the rules of fair play, the people lose faith in the State and, equally important, in the worth of the rules themselves? Is it any wonder that, having forestalled an explicit mandate from this Court that refunds be automatically paid when taxes have been unconstitutionally imposed and collected, the States continue in their defiance, depriving compliant taxpayers such as the Petitioner here of their tax refunds? Regrettably, it is no wonder at all.

To paraphrase Shakespeare, without a refund taxpayers' rights are illusory and without regard.[3] The last decade and a half has been a disturbing number of state taxing statutes—including more than one of Florida's laws—invalidated on constitutional grounds.[4] Moreover, even

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[2] As the Court recognized in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), the States have a vested financial interest in encouraging taxpayers "to make timely payments prior to resolution of any dispute over the validity of the tax assessment." 496 U.S. at 37. Denying refund claims under a statute that had heretofore been considered applicable could serve to encourage taxpayers to resist payment and undermine compliance in general. *See* Philip M. Tatarowicz, *Right to Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues under the Commerce Clause*, 41 TAX LAW. 103, 143 (Fall 1987).

[3] WILLIAM SHAKESPEARE, MACBETH act 3, sec. 2, line 11 ("Things without all remedy/Should be without regard: what's done is done.").

[4] *See, e.g., Armco Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984) (West Virginia's business and occupation tax); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984) (Hawaii's exemption of local products from the liquor excise tax); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882-83 (1985) (Alabama's tax on foreign insurers); *Tyler Pipe Indus. v. Washington Dep't of Revenue*, 483 U.S. 232, 248 (1987) (Washington's business and occupation tax); *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 286-87 (1987) (Pennsylvania's highway use tax); *Davis v. Michigan Dep't of*

after the statutes have been voided, some States resisted efforts to refund the taxes that they had collected under the invalidated laws—first on grounds the substantive decision should be given prospective-only effect and then on grounds the taxpayer failed to abide by the affected State's procedural requirements. That the States have moved from defending constitutionally deficient laws to pleading for prospectivity to distending their remedial statutes should not obscure this basic truth: Even if the disputes began as a good-faith argument over a statute's constitutionality, they are ending with the States' refusal to pay over funds properly belonging to taxpayers. This pattern of misbehavior should be stopped.[5]

Treasury, 489 U.S. 803, 814-15 (1989) (Michigan's tax on federal retirees' pensions); *McKesson*, 496 U.S. at 22 (Florida statute exempting local products from liquor excise tax); *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647-54 (1994) (Missouri's supplemental use tax). *See also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 532 (1991) (involving the retroactivity of a decision striking down a Georgia statute); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1993) (involving the retroactivity of the *Davis* case); *Reich v. Collins*, 513 U.S. 106, 114 (1994) (same).

[5] After this Court struck down Hawaii's liquor tax exemption for local products in *Bacchus Imports, Ltd.*, 468 U.S. at 273, as violative of the Commerce Clause, the Florida legislature acknowledged that its own local product exemption was invalid. In spite of this admission, the Florida legislature resisted compliance with this Court's mandate and required a subsequent decision from this Court before deigning to comply. *See McKesson*, 496 U.S. at 46. Indeed, although the named plaintiff in *McKesson* settled with the State of Florida, similarly situated taxpayers (including some who joined in challenging the statute in the lower courts) have been consistently denied relief during the intervening seven years. *Division of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 643 So. 2d 16, 19-20 (Fla. Dist. Ct. App. 1994), *cert. denied*, 514 U.S. 1083 (1995). *See also General Motors Corp. v. City of Kansas City*, 895 S.W.2d 59 (Mo. Ct. App.), *cert. denied*, 116 S. Ct. 277 (1995) (new interpretation of law applied to deny taxpayer a refund for unconstitutionally collected taxes); *Swanson v. North Carolina*, 441 S.E.2d 537 (N.C. 1993) (procedure that did not permit taxpayers to challenge a tax before payment nonetheless held to satisfy due process requirements and bar taxpayers' refunds).

Over the years, the States' refusal to fashion meaningful remedies has been rationalized on equity grounds. Hence, many States argued that the balancing test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), could be applied to safeguard the constitutional rights of taxpayers, while protecting the financial interests of the States. Experience convinced this Court, however, that the *Chevron Oil* standard was too pliant, enabling too many States to construe it in a "heads I win, tails you lose" manner. Consequently, in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), this Court embraced the full retroactivity standard of *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987).[6] One year later, in *Reich v. Collins*, 513 U.S. 106 (1994), the Court squarely addressed the issue of remedy, declaring that a State may not hold out what plainly appears to be a "clear and certain" post-deprivation remedy—its tax refund statute—and subsequently declare, after taxpayers have paid the disputed tax, that the remedy is inapplicable to the case at hand.

The instant case reprises the question of remedy—a question the Court undoubtedly and hopefully thought it had resolved by declaring in *Reich* that the States may not resort to "bait and switch" tactics. *Reich*, 513 U.S. at 111.[7] The State of Florida has not learned the lesson of *Reich*. Rather than refunding the unlawfully collected taxes, it has engaged taxpayers in a game of remedy roulette in which it has repeatedly changed the rules to ensure the house always wins.

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[6] *Grffith* holds that new rules for the conduct of criminal prosecutions must apply retroactively to all pending or non-final cases, even if they constitute a "clear break" with the past. 479 U.S. at 328. *Harper* extends the rule to civil cases. 509 U.S. at 99.

[7] *See Carpenter v. Shaw*, 280 U.S. 363, 369 (1930) ("a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment"); *Reich*, 513 U.S. at 114.

II.

In 1992, the Supreme Court of Florida struck down as unconstitutional the State's discriminatory scheme for imposing sales tax on magazines but not on newspapers. *Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So. 2d 459 (Fla. 1992).[8] The court granted injunctive relief by striking down the exemption from tax for newspapers. 604 So. 2d at 463-64. Relying upon sections 72.011 and 215.26 of the Florida Statutes, FLA. STAT. §§ 72.011 & 215.26 (1987), *reprinted at* Appendix E to Newsweek, Inc.'s Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District (App.) at App. 13a-16a, Newsweek timely filed a claim seeking a refund of the taxes paid into the State treasury.[9] The relief the company sought—full refund of the legally collected taxes—is consistent with what had been the longstanding policy of the State of Florida. That policy was articulated by the state supreme court more than 50 years ago, as follows:

> A reading of the quoted acts in full declares a policy to make complete restitution to any citizen who (1) overpays any tax, license, or account, (2) pays when no tax or license is due, and (3) pays any tax or account into the State Treasury in error. . . . Our conclusion on this point is also supported by the well settled rule of tax statute construction that, if the text does not reveal with certainty the intent of the Legislature and it is susceptible of two meanings, *that meaning most favorable to the taxpayer should be adopted.*

Walgreen Drug Stores Co. v. Lee, 28 So. 2d 535, 536 (Fla. 1946) (emphasis added). Equally important, the

[8] The Florida court held that the tax violated the First Amendment of the U.S. Constitution. 604 So.2d at 462-63.

[9] The availability of refunds for the taxes unconstitutionally collected under the voided statute was not directly at issue in the *Magazine Publishers* case.

procedure under section 215.26—according the taxpayer a just result—has long been available to those seeking refunds of taxes paid under unconstitutional statutes. *E.g., State ex rel. Hardaway Contracting Co. v. Lee*, 21 So. 2d 211 (Fla. 1945).

A half century of laudatory experience notwithstanding, the court below did not grant Newsweek relief. Indeed, the court did not even acknowledge the force of the cited cases but instead contorted the applicable statutes to deny the company's refund claims. *Newsweek, Inc. v. Department of Revenue of the State of Florida, Lawrence H. Fuchs, and Robert F. Milligan*, No. 96-1882 (Fla. Dist. Ct. App. Feb. 18, 1997), *reprinted at* Appendix B to Newsweek, Inc.'s Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District (App.) at App. 6a-7a. Specifically, the court facilely held that Newsweek had the option of using a predeprivation statute to contest the legality of the tax by paying the monies into the court registry. *Id.* In doing so, the court resisted the plain reading of the statute that requires an *assessment* of tax before that procedure may be used. FLA. STAT. § 72.011(1) (1987), *reprinted at* Appendix E to Newsweek, Inc.'s Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District (App.) at App. 13a.[10] The court also disregarded case law interpreting the staute in a taxpayer-favorable manner. *Florida Export Tobacco Co. v. Department of Revenue*, 510 So. 2d 936, 942 (Fla. Dist. Ct. App. 1987). Finally, it ignored Newsweek's having the choice—at least until the decision below was rendered—between (1) using the pre-

[10] In point of fact, Newsweek could *not* use the predeprivation statute on its face because the company had paid the tax when due and therefore there was no assessment from the Department of Revenue. FLA. STAT. § 72.011(2) at App. 13a ("No action may be brought to contest an assessment of any tax, interest, or penalty assessed under a section or chapter specified in subsection (1) after 60 days from the date the assessment becomes final."). Thus, the procedure was not available until Newsweek's refund claim was denied.

deprivation procedure under section 72.011 and (2) paying the tax and suing for a refund under section 215.26 of the Florida Statutes.

In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 45-46 (1990), this Court stated that, to satisfy the requirements of due process, the State must provide an aggrieved taxpayer either with a predeprivation hearing (without placing the taxpayer seeking such a hearing under duress[11]) or with "meaningful backward-looking relief." 496 U.S. at 31. The Court also acknowledged that the State might constitutionally require that the challenged taxes be paid under protest or, alternatively, that refund claims be filed within a specified period of time. *Id.* at 45. In other words, "a State need not provide [a] predeprivation process for the exaction of taxes." *Id.* at 37 (footnote omitted).[12] To be meaningful—and constitutionally sufficient—however, the taxpayer's remedy must be "clear and certain." *Id.* at 39 (*quoting Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912) (Holmes, J.)).

On its face, the State of Florida's statutory scheme comports with the procedural requirements enunciated in *McKesson* by providing what seemed to be a "clear and certain" refund procedure. This case is before the Court,

[11] The Court explained that "when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure." 496 U.S. at 38 n.21. The sanctions in *McKesson* included a warrant for seizure and sale of the taxpayer's property, a 50-percent penalty, and interest of 1 percent per month. *Id.* at 38 n.20. Newsweek faced almost identical sanctions here (although the penalty rate is 25 percent).

[12] Indeed, the Court explained why States could properly decide not to allow taxpayers to litigate their tax liabilities prior to payment: Such a procedure could "threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult." *Id.* (footnote omitted).

however, because the court below vitiated that remedy, finding first that the refund statute was inapposite and further that Florida law provided a constitutionally sufficient predeprivation remedy. That predeprivation remedy, however, was not even a glimmer in the State of Florida's eyes until after the sales tax was declared unconstitutional.

Even assuming that the Florida procedure would not place the taxpayer under duress (which would by itself undermine the supposed sufficiency of the predeprivation remedy), can such a patchwork—concocted by the State several years after the taxes were paid—satisfy the requirement that the taxpayer's remedy be "clear and certain"? *Amicus* TEI submits that to pose the question is to answer it. The purpose of the Due Process Clause is to protect individual rights against arbitrary action by the government, but what is more arbitrary than inventing and interposing new requirements after the time for satisfying those requirements has passed? At best, the predeprivation remedy was inchoate when Newsweek paid the challenged taxes; at worst, it was conjured out of thin air long after the fact.

In *Reich*, the Court held that a State may not "reconfigure its scheme, in midcourse"—to "bait" taxpayers into believing that a refund remedy exists, only to "switch" later by claiming its inapplicability. This is because stealth remedies—playing "gotcha" with taxpayers—are not consonant with due process. States must treat their citizens fairly; they may not lull taxpayers into paying a tax—believing that a "clear and certain" post-deprivation remedy exists, in the form of a tax refund statute—only to declare after those taxes have been paid that no such remedy exists. *See* 513 U.S. at 111. The Florida court's refusal to order a refund in this case is precisely the type of "mischievous consequences" that the Court warned of 130 years ago in confirming the application of the Supremacy Clause to this Court's decisions. *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867).

Stated bluntly, like the State of Georgia in *Reich*, Florida here endeavors to shoehorn Newsweek into a refund scheme that, by its very terms, will deny it relief. The court below parsed Florida's refund statute and analyzed the other provisions of the Florida statutes, not in search of principle or justice, but for a loophole. By remedy legerdemain, it sought to emasculate the Court's mandates in *McKesson* and *Reich*—to render them hollow—rather than to vivify them. That the action of the court below might pass muster under federal due process principles truly beggars the imagination.[13] In *Reich*, this Court refused to permit "bait and switch" tactics by the State of Georgia. It should invoke the same rationale here, grant a writ of certiorari, and reverse the decision of the Florida court.

III.

This Court is properly loath to impinge on the state courts' prerogative to fashion remedies after the substantive issues in the case are decided. *See National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 115 S. Ct. 2351, 2364 (1995) ("principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration"). *Reich* stands for the proposition, however, that the States' remedial discretion is not unfettered, especially where that discretion has been repeatedly abused. History is irrefutable: In the past decade and a half, State after State has distended this Court's holdings—on the merits, on the retroactivity question, and now on the issue of remedies

[13] *See McKesson*, 496 U.S. at 39 (if a tax is beyond the State's power to impose, the State has no choice but to "undo" the unlawful deprivation by making refunds "because allowing the State to 'collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment.'" (*quoting Ward v. Board of Comm'rs of Love County*, 253 U.S. 17, 24 (1920)).

—in order to eviscerate the protections accorded taxpayers by the Constitution.

Two centuries ago, the Framers recognized the need for the federal courts to vigilantly safeguard rights against the parochialism of the States. In *The Federalist No. 80*, Alexander Hamilton used the example of claims to land under grants of different States to underscore the need for diversity jurisdiction:

> The courts of neither of the granting states could be expected to be unbiassed. The laws may have even prejudged the question and tied the courts down to decisions in favour of the grants of the state to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government.

THE FEDERALIST No. 80 (Alexander Hamilton), *reprinted in* II THE DEBATE ON THE CONSTITUTION 476, 479-80 (Library of America 1993). Justice Story elaborated in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816):

> The constitution has presumed (whether rightly or wrongly we do not inquire), that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.[14]

See John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 22-28 (1948) (diversity jurisdiction was the product in part of "[t]he desire to avoid regional prejudice against commercial

[14] *See* THE FEDERALIST No. 81 (Alexander Hamilton), *reprinted in* II THE DEBATE ON THE CONSTITUTION, *supra*, 483, 487-88 ("The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes. . . .").

litigants, based in small part on experience and in large part on common-sense anticipation.").

To be sure, the insularity of the States has generally tempered over the years, and the concerns that led to the development of diversity jurisdiction are not wholly present here. Nevertheless, the principle remains the same. The Court "cannot leave to the States the formulation of the authoritative laws, rules, *and remedies designed to protect people from infractions by the States of federally guaranteed rights.*" *Chapman v. California*, 386 U.S. 18, 21 (1967) (emphasis added).

It is time for the Court to end its willing suspension of disbelief concerning the States' commitment to protect the constitutional rights of business taxpayers. The States should not be permitted to thwart the judgments of this Court by creating one excuse after another for refusing to return to taxpayers what the States had no right to take in the first instance.[15] Unless the Court mandates *meaningful* relief—the immediate refund of the unlawfully collected taxes—the States will continue to have an incentive to enact unconstitutional statutes—to "roll the dice" with

[15] Nor should the States be able to avoid paying refunds by holding open the possibility of retroactively taxing the beneficiaries of discriminatory taxing schemes (for example, the newspapers that benefitted from the unconstitutional sales tax exemption here) when in practice they have not taken one step toward imposing such a compensating tax. *See McKesson*, 496 U.S. at 51 ("Florida may satisfy this obligation [to provide a 'clear and certain remedy'] through any form of relief, ranging from a refund of the excess taxes paid by petitioner to an offsetting charge to previously favored distributors, that will cure any unconstitutional discrimination . . . ."). Ironically, States have viewed the Court's decision in *McKesson* not as providing them with a false choice (what politician would seek to impose a retroactive tax on his or her own citizens or businesses in order to cure the constitutional harm done to out-of-state citizens or businesses?), but as giving them license to avoid the only remedy truly consonant with the Constitution (immediate refunds).

the constitutional rights of taxpayers, knowing that, at worst, they may have to mend their ways in the future.[16]

In the final analysis, then, this case is about more than Newsweek's entitlement to the tax dollars that the State of Florida illegally extracted from the company. It is about the legitimacy and vitality of this Court's decisions.

[16] That the States' approach in the cases invalidating state taxing schemes is driven more by their desire to avoid responsibility for their unconstitutional acts than by a reasonable interpretation of this Court's decisions is perhaps best illustrated by a case in which the roles of taxpayers and the States on the retroactivity issue were reversed from what they typically have been. In *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768 (1992), the Court considered whether two earlier decisions—*ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982), and *F.W. Woolworth Co. v. Taxation & Revenue Dep't*, 458 U.S. 354 (1982)—should be overruled. Had those cases been overturned, the States would have been free to tax a larger share of the income of out-of-state businesses, and the Court invited briefs on whether any such overruling should be retroactive. Although the case would have involved the overruling of express and directly applicable Supreme Court precedent of less than ten years' duration (which itself relied on an unbroken chain of Supreme Court decisions dating back to 1875)—and notwithstanding the States' almost uniform resistance to retroactive holdings where taxing schemes have been invalidated—29 States, the District of Columbia, Guam, and the Virgin Islands filed a brief unabashedly arguing that "the *Chevron Oil* test can accommodate both an overruling decision and a holding of retroactivity." *See* Brief by Alabama, Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Guam, Hawaii, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming as Amici Curiae in Support of Respondent, *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768 (1992) (No. 91-615) at 16. Such an "accommodation," however, which some States seem ready to carry over to the issue of remedy, seems completely untethered by principle or consistency. As the Fifth Circuit observed in *Kurzner v. United States*, 413 F.2d 97, 112 (5th Cir. 1969), "the courts have not yet become so cynical as to subscribe to the tax-dollar school of statutory construction."

To be sure, the States pay lip service to *McKesson*, *Harper*, and *Reich*, but in reality they have shown a brazen disregard for the Supremacy Clause, and an unbending willingness to thwart the directives of the Court and to undermine the protections of the Constitution.

It is time for this Court to say that enough is enough. It is time to reject the States' beguiling interpretations of state law, distended readings of the Constitution, and facile efforts to vitiate this Court's mandates. It is time to halt their efforts to treat taxpayers' constitutional rights as unwelcome guests at a dinner party, thinking that if they simply ignore them, they will go away. It is time to say, once again—and to demonstrate by the force of its decision—"[t]he time for toleration has come to an end." *Griffith v. Kentucky*, 479 U.S. at 323 (*quoting United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982)).

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari, reverse the decision of the District Court of Appeal of Florida, and order the State to refund the taxes it unconstitutionally imposed on the Petitioner.

Respectfully submitted,

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